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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
Amendment of Section 2.106)	
Commission's Rules to Allocate)	ET Docket No. 95-18
Spectrum at 2 GHz for Use)	
by the Mobile-Satellite Service)	

COMMENTS OF MEDINA ELECTRIC COOPERATIVE INC.

These Comments are filed by Medina Electric Cooperative Inc. (MEC) pursuant to the Federal Communication Commission's (Commission) Rules, 47 C.F.R. §§ 1.415 and 1.419 (1998), and the Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order issued November 27, 1998 in the above-captioned proceeding.

I.

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II.

MEC, a Texas corporation headquartered at 2308 18th Street, Hondo, Texas, 78861, is an electric distribution cooperative. The MEC transmission system and service areas span much of south-central Texas. In addition to the distribution of electric energy, MEC owns and operates certain electric generating and transmission facilities. MEC's electric operations are supported

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by a microwave radio communications network that was initially installed thirty years ago, and which has been upgraded over the years. MEC is licensed by the Commission as a Fixed Service (FS) Microwave provider, with a number of the licenses entitling MEC to use frequencies in the 2 GHz band.

III.

On March 13, 1997, in ET Docket No. 95-18, the Commission adopted a First Report and Order and Further Notice of Proposed Rule Making (First Report and Order) modifying the Broadcast Auxiliary Service (BAS) and Fixed Service (FS) microwave allocations. The 70 MHz of spectrum at 1990-2025 MHz and 2165-2200 MHz bands was allocated to Mobile-Satellite Service (MSS), effective January 1, 2000. In order to allocate the spectrum for MSS, the bands generally must be cleared of incumbents, except when spectrum sharing by the MSS and FS microwave licensees is possible without harmful mutual interference. In its order, the Commission determined that the MSS licensees must bear the cost of relocating incumbent licensees to their new bands. On November 27, 1998, the Commission issued a Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order (Memorandum Opinion) in response to two petitions for reconsideration and a petition for clarification on the Commission's First Report and Order. In addition, in accordance with the 1997 Budget Act,¹ the Commission also reallocated 40 MHz

¹ *Balanced Budget Act of 1997*, P.L. No. 105-33, 111 Stat. (continued...)

of spectrum at 2110-2150 MHz to the Fixed and Mobile Services, for the eventual assignment of licenses by auction.

In its November 27 Memorandum Opinion and Order, the Commission re-affirmed its decision that MSS providers must pay the incumbent licensees' relocation costs. This decision was based primarily on the Commission's relocation policies established in the *Emerging Technologies* proceedings, i.e., that the emerging technology service provider must (i) guarantee payment of all relocation expenses, (ii) build and test the new microwave facilities, and (iii) demonstrate that the new facilities are qualitatively comparable to the original facilities.²

In its November 27 Notice of Proposed Rule Making, the Commission, as noted, proposed the addition of 40 MHz to the 2 GHz band for reallocation through competitive bidding. The Commission also therein proposed certain clarifications about the manner in which the FS relocation procedures would work for all

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251 § 3002(c)(3) (1997).

² See, *In re Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies (Emerging Technologies)*, ET Docket 92-9; *First Report and Order and Second Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994).

of the bandwidths covered by these proceedings (2110-2150 MHz and 2165-2200 MHz).

IV.

Traditionally, MEC has not actively participated in Commission rulemaking proceedings due to their limited applicability to MEC. Having only recently become aware of the above-captioned proceeding, MEC is still studying the implications of the Commission's proposed rulemaking and the potential effects of the proposed allocation rules. Based on our analysis to date, and in light of MEC's circumstances as described below, however, MEC has determined that it must take this opportunity to register certain concerns.

- ▶ MEC should be deemed an incumbent FS microwave licensee for relocation purposes.

As discussed above, over the years MEC has been licensed by the Commission as a FS Microwave provider. Recently, however, MEC has had various problems with certain of its licenses, included among which are two which may well be affected by the outcome of the instant rulemaking proceeding. The background is as follows.

In 1996, MEC and a PCS licensee negotiated a relocation arrangement, under which the operation of MEC's microwave radio system at the Pearsall Generating Plant in Frio County, call signal WEG432, was to be relocated to a higher frequency at the PCS licensee's expense. In reporting the change to the Commission, the Commission was advised that, based on a re-

measurement of the transmitting tower at Pearsall, a slight change in ground elevation should be noted. Because of the correction of the ground elevation of the Pearsall tower, MEC was advised that it would have to amend two FS Microwave licenses (for Dilley, call sign WNEW346, and D'Hanis, call sign KFB43, both of which are located in the 2180-2190 band) to reflect the "change" in microwave flow path between Pearsall and these two stations. As there had been no physical changes, MEC assumed this was just a ministerial matter. In January, 1997, MEC received modified licenses for WNEW346 and KFB43, but they were marked "secondary." Based on the Commission's interim licensing policy, discussed below, MEC promptly requested reconsideration of this secondary status determination. That request is still pending.

Although these two MEC microwave licenses are thus presently, and provisionally, considered "secondary", MEC requests confirmation that, for the purposes of relocation by emerging technology providers, including PCS and MSS licensees, MEC will, pending Commission action on its reconsideration request, be considered an incumbent microwave licensee with primary status.³

3 In the *First Report and Order*, then affirmed by the *Memorandum Opinion*, the Commission determined that it would, in this MSS proceeding, apply its *Emerging Technologies* proceeding's relocation policies, under which incumbents are entitled to be compensated for reasonable relocation expenses by the emerging technology licensee. Designed to apply to all new technology licenses in the 2 GHz band, the relocation policies were
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Historically, during the interim period (e.g., when spectrum is shared (co-primary status), during the voluntary and mandatory negotiation periods, and/or before the emerging technology provider is deemed to have sole primary status), it has been the Commission's policy (discussed in the Commission's orders on PCS relocation and codified at § 101.81) that a limited number of minor technical changes would be allowed for incumbent microwave licenses without affecting the incumbent's primary status. The permissible technical changes include: decreases in power; minor changes in antennae height; minor location changes; certain data corrections; changes in ground elevation; changes in equipment; etc. A logical extension of this policy would be to avoid penalizing incumbents such as MEC who happened to enter this interim period with such minor technical changes in progress. This is especially justified where, as here, the change is purely ministerial; no physical alteration of any kind is involved. The Commission also has recognized that other modifications will not change the incumbent's primary status if the incumbent

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developed in response to "advances in digital technology and signal processing that enabled the development of a broad range of new radio communications that are relocated for the benefit of emerging technology service providers". (*In the Matter of Amendment of Section 2.106 of the Commission's Rules to allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18; *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order*, FCC 98-309 at 11 (1997)). MEC urges the Commission to follow through with this determination, and require emerging technology providers, like the instant case's MSS providers, to compensate incumbent licensees for relocation.

affirmatively justifies its primary status and demonstrates that the modifications will not increase the emerging technology provider's cost of relocation. See, 47 C.F.R. § 101.81.

In the instant case, MEC has held FS Microwave licenses for a number of years in the bandwidths the Commission has decided to reallocate to emerging technologies, including the 2165-2200 MHz band. All of the changes in status which MEC has now found itself required to seek for these licenses seem to fall directly within the Commission's interim licensing policy, as described above. All of MEC's license "modifications" satisfy both tests for allowing an incumbent to maintain its primary status under the Commission's interim licensing policy -- (i) the changes relate to ground elevation and antenna height and (ii) MEC has affirmatively explained the reason for the changes and why primary status should not be lost, *i.e.* no physical change has actually occurred and the license modifications do not add to the relocation costs.

With the allocation of licensing rights in the 2165-2200 MHz bandwidth to MSS providers beginning on January 1, 2000, MEC is very concerned about the current status of MEC's licenses, since our reconsideration request for primary status in these bandwidths is still pending. As described above, MEC's modifications to its licenses fit squarely into the category of minor, technical changes that the Commission has deemed in its interim licensing policy to not affect a FS Microwave's primary status. It is critical that the Commission recognize this fact

in its final order regarding the allocation of spectrum for MSS providers, since, technically, only incumbent primary licensees may receive compensation for relocation. In affording this protection to MEC, the Commission would be acting in concert with its recognition in the *Emerging Technologies* proceedings of the importance of these existing microwave systems to public utility management, especially in rural areas.⁴

- ▶ The Commission should clarify that FS Microwave incumbents do not have to share spectrum if they can demonstrate such an arrangement would cause interference.

MEC requests clarification regarding the Commission's spectrum sharing proposal. In certain circumstances, MSS licensees may be able to avoid relocation costs by sharing spectrum with the incumbent microwave licensees. While MEC does not necessarily object to this sharing proposal, we request that the Commission clarify that the incumbent may demand relocation if the incumbent demonstrates on the basis of a coordination analysis that its system can reasonably be expected to suffer interference from sharing the spectrum with the MSS licensee. The critical test should be whether sharing would be likely to cause harmful interference, not whether such sharing is already actually causing such interference. The interference standards reportedly under development by the Telecommunications Industry Association should be useful in this respect.

⁴ See, *Emerging Technologies First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886 at ¶21 (1992).

- ▶ The Commission's proposed sunset and good faith guidelines should be suitable.

In this Rulemaking, the Commission proposes that FS relocation in the 2110-2150 and 2165-2200 GHz bands would be accomplished using the same sunset and good faith guidelines developed and applied in the *Microwave Relocation Cost-Sharing* proceeding, which themselves amended the standards for FS relocation first propounded in the *Emerging Technologies* proceeding.⁵ The sunset guidelines provide for (i) a ten year sunset period, (ii) commencing with a voluntary negotiation period, and (iii) entitling the FS incumbent to at least six-months notice of forced relocation or shutdown at the end of that period, if interference is found and no arrangement has been worked out with the new licensee.⁶ Where involuntary relocation is imposed during the ten-year period, the incumbent is entitled to be compensated for its actual replacement cost, with a few exceptions.⁷

MEC sees no reason for the Commission to depart from the established relocation criteria with respect either to timing or

5 These guidelines are codified at 47 C.F.R. § 101.79 (sunset) and 47 C.F.R. § 101.73 (good faith negotiation).

6 See, *Microwave Relocation Cost-Sharing First Report and Order/Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825 at ¶65 (1996).

7 *Emerging Technologies Memorandum Opinion and Order*, 9 FCC 1943 at ¶¶55, 63 (1994); *Microwave Relocation Cost-Sharing First Report and Order/Further Notice of Proposed Rule Making*, 11 FCC Rcd 8832 (1996).

the good faith requirement. At a minimum, the Commission must provide sufficient time for incumbents and MSS licensees to engage in meaningful negotiations that will allow mutual relocation agreements. The ten-year time frame serves that purpose, giving adequate opportunity for the two parties to identify each other and determine options, but not so small an interval that the new licensee (here the MSS provider) is tempted to intimidate the incumbent by threatening simply to "wait it out."

V.

WHEREFORE, MEC respectfully requests that the Commission include the traditional incumbency relocation requirements in any rule directing the reallocation of the 2 GHz spectrum for use by Mobile-Satellite Service providers; and, further, that the Commission clarify that, pending action on its reconsideration request for its WNEW346 and KFB43 licenses, MEC should be deemed entitled to the benefits of an incumbent with primary status with respect to such licenses.

Respectfully submitted,



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